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Supreme Court of the United States

OCTOBER TERM, 1895.

No. 765.

THEODORE F. BROWN,
Appellant.

vs.

JOHN W. WALKER,
U. S. Marshal, etc.

APPELLANT'S BRIEF.

JAMES C. CARTER,
Of Counsel for Appellant.

ALBERT B. KING & CO. 105 WILLIAM ST., N. Y

U. S. Supreme Court.

THEODORE F. BROWN,
Appellant,

vs.

JOHN W. WALKER, Marshal, &c.,
Appellee.

Specification of Errors relied upon.

The decree or order appealed from is alleged to be erroneous in this, that it directed the writ of *habeas corpus* to be discharged, and remanded the body of Theodore F. Brown to the custody of the marshal, whereas it should have discharged the said Theodore F. Brown from custody.

United States Supreme Court.

Theodore F. Brown,
Appellant,

vs.

John W. Walker, Marshal, &c.,
Respondent.

The appeal in this case is from the order of the United States Circuit Court for the Western District of Pennsylvania, made on the return to a writ of *habeas corpus* sought for by the appellant that he might obtain discharge from an imprisonment alleged by him to be unlawful, remanding him to the imprisonment.

It appears that the petitioner had been subpœnaed as a witness before the Grand Jury at a term of the District Court of the same district to testify in relation to a charge, then under investigation by that body against certain officers and agents of the Allegheny Valley Railway Company, of having violated provisions of the Interstate Commerce Act. Certain interrogatories were addressed to the witness which he refused to answer on the ground that his answers might tend to incriminate him. On a rule to show cause why he should not be punished for a contempt and be compelled to answer, he set up and relied upon his constitutional privilege of silence. No question was made concerning the good faith of the petitioner in invoking this privilege, but the ground was taken, and held sufficient, that under the statute of February 11th, 1893, he was bound to answer the questions, and still persisting in his refusal, he was adjudged guilty of contempt and committed. He obtained a writ of *habeas corpus* from the Circuit Court, and on the production of his body before that Court and the return of the marshal, the same ground was again taken and the statute was held valid and sufficient to require the petitioner to answer, and he was remanded. From the order remanding him the petitioner appeals to this Court.

First Point.—The protection against self incrimination afforded by the Fifth Amendment is, in its very terms, *absolute*. The words "nor shall (any person) be compelled in any criminal case to be a witness against himself" confer upon a witness the privilege of *standing mute* whenever called upon to reveal any fact, a knowledge of which would aid in bringing any act of his life within the definitions of crime.

Second Point.—Any legislative enactment designed to compel from a witness any self-criminating testimony by relieving him from punishment for the crime, it matters not how complete it may be, if it leaves the witness *in any worse condition*, so far as the consequences of guilt are concerned, then he would be in if he stood mute would be in violation of the constitution and invalid.

1. This seems to be self-evident. Surely the constitutional safeguard cannot be superseded by a legislative substitute of narrower scope.

2. This is, in effect, conceded by the opinion of the Court below. That opinion asserts the sufficiency of the act of 1893, saying "The "act of testifying has, so far as he is con-"cerned wiped out the crime; it has ex-"cepted him from the operation of the law, "and, as to him, that which in others "is a crime has been expunged from the "statute books. If then there exists, as to "him, no crime, there can be no self-crimi-"nation in any testimony he gives, &c., &c." This reasoning, if its assumptions as to the effect of the statute were well founded, would seem to be correct.

3. The same proposition was in substance asserted and acted upon by this Court in the case of Counselman *vs.* Hitchcock (142 U. S., 547). Mr. Justice Blatchford, giving the opinion of the Court, says: "Legislation can-" not detract from the privilege afforded by

"the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled in "any criminal case to be a witness against "himself, unless it should be provided by "statute that criminating evidence extracted from a witness against his will "should not be used against him" (p. 565). "It is quite clear that legislation cannot abridge a constitutional privilege, and "that it cannot replace or supply one, at "least, unless it is so broad as to have the "same extent in scope and effect" (p. 583).

The question in that case was, in the view of the Court, whether Section 860 of the Revised Statutes left the witness in any worse position than he would have been in had he remained silent, and it was held that it did.

4. All the authorities which hold a different doctrine, and sustain acts of indemnity which leave the crime *in any degree existing*, where there are constitutional safeguards substantially like that under notice, were disapproved and rejected by this Court in the case last mentioned.

5. Our proposition is affirmed upon a very thorough examination [by the U. S. District Court for the Northern District of Illinois.

United States *vs.* James, 60 Fed. Rep., 257.

Third Point.—The most plausible defence for the attempt to compel the appellant to testify is to be found in the assertion that he could not invoke the constitutional safeguard, for the reason that he was *not within its terms;* that the Act of February 11th, 1893 (U. S. Stat., Vol. 27, p. 443), in effect *abrogated his crime* and left him in the attitude of an *innocent* man, and, consequently, that his testimony could not *incriminate* him, and he would not be a *witness against himself*. This view must be promptly rejected.

1. In the first place the act has no language purporting to *abrogate* the crime. It leaves the crime subsisting, and only provides a protection against any proceeding to punish it. A man may be guilty, in every sense, of a crime, and yet have a good defense against any proceeding to punish him for it. He is guilty, if any act committed by him falls within the legal definition of a crime.

2. If the crime is abrogated by the act, when is it done, and what does it? The witness is guilty when he takes the stand, and until after the interrogatory is addressed to him; and, if he refuses to answer it, he will continue guilty. It is only *when* he makes an answer which contains incriminating matter, and *by making such answer*, that he becomes purged of his guilt, if, indeed he does become purged of it. At the *time*,

therefore, when he asserts his privilege it is not *true* that he is not within the terms of the constitutional safeguard.

3. But he does not become purged of the crime. It is clear that the witness after being compelled to testify may still be rightfully indicted, convicted and punished for a matter concerning which he has testified. A Grand Jury would be bound to indict him upon proof that some act committed by him came within the legal definition of the crime. That body could not, or might not, know that he had previously been compelled to testify concerning it, nor would the District Attorney necessarily have any such knowledge. Upon his trial he might be convicted upon proof of the averments of the indictment by evidence other than proof of his testimony, but brought to light by the clues afforded by that testimony, unless he took upon himself the burden of pleading and proving, and was able to plead and prove, several distinct matters, namely—(1.) that a prior criminal case had been instituted against some person. (2.) That it was with full jurisdiction; and (3.) that in the course of it he was called as a witness, and had testified *concerning the matter for which he was indicted.* This, not to speak of the labor, trouble and expense it might require, he might not be able to do; and if he did not do it he would be *rightfully* convicted and punished.

4. Nor could it properly be said by way of answer to such an argument that it is always a possibility that an innocent man may be convicted. This cannot *rightfully* happen. It involves perjury, or, at least, error; whereas in the case supposed the conviction proceeds upon true testimony and a correct application of the law.

5. The statement, therefore, that the statute *abrogates the crime*, leaves the witness as if he were an *innocent* man, and, consequently, that he does not come within the constitutional safeguard, and is not compelled to criminate himself is not true, and must be rejected.

Fourth Point.—It may be argued that the foregoing reasoning, while logically correct and sufficient to show that the crime is not, strictly speaking, *abrogated*, is yet too rigid and technical; and that is enough if the statute furnishes an equivalent, *substantially complete*, for the constitutional safeguard. Such a view must also be rejected.

1. A sufficient reason why it must be rejected is that the constitutional safeguards for life and liberty cannot be thus dealt with. They must stand as the constitution has erected them. They cannot be set aside

and replaced by something different on the ground that the substitute will *probably* answer the same purpose. The citizen is entitled to the *very thing* which the language of the constitution assures to him. On such a matter rigid reasoning is appropriate, and, indeed, necessary.

2. But, indulging for a moment the supposal that the constitutional safeguard may be replaced by a substitute, the substitute furnished by this act is by no means a *substantial* equivalent. It leaves the witness *in a worse condition* in several very important particulars.

a. The statute imposes upon the witness a *new requirement* or *condition*, with which he must comply in order to secure the benefits which the constitution confers; namely, the burden, hereinbefore mentioned, of answering to an indictment and of proving three things, (1) that a prior criminal case had been instituted; (2) that it was with full jurisdiction; and, (3) that he had been required to testify in it concerning the very matter for which he was indicted. These burdens are by no means fanciful. How is the testimony which he was required to give, and the proof of the fact that he gave it, to be perpetuated so that it may easily be had on any and all occasions? And what right has Congress to subject the constitutional immunity to *any* conditions whatever, or to expose it to any hazards?

The subsequent indictment of the witness against which he must defend himself, may be at one extreme of the country, and the place where he is compelled to give the incriminating evidence at another. To make good the defence which the statute secures he must procure from a place a thousand miles away both documentary and oral proofs. He must prove his former testimony and the particular matter *concerning* which it was given. This a poor man may be unable to do, and the proofs may be lost by accident, neglect or death. Will any one say that these burdens and perils are not of the most substantial nature? Under the common law rule a distinction has been taken between the cases of a crime, prosecution for which was barred by the statute of limitations, and a crime pardoned, to the effect that in the former case the witness may be compelled to testify, but not in the latter; and the reason assigned was that in the former case no conviction could rightfully be had, it being necessary for the State to prove that the offence was committed within the statutory limit, whereas in the latter the accused would be obliged to *plead* his pardon. And yet in the latter case no burden is imposed other than the mere plea and production of the paper.

R. *vs.* Reading, 1 M. and M., 193, *note.*

b. In short, the broad distinction between the constitutional safeguard and the statutory protection is that the former goes towards relieving the witness from the danger of any *accusation* being made against him; the latter compels him to supply materials and suggestions *looking to an accusation* against him, and contents itself with the furnishing of *means for a defence* only.

This defence, if it be not in every sense a *pardon* (which it really is), is of the *nature* of a pardon, is matter of *confession* and *avoidance*, and must be pleaded, or otherwise affirmatively brought forward by the party entitled to the benefit of it.

U. S. *vs.* Wilson, 7 Pet., 150.
4 Bl. Com., 376.
1 Chit. Crim. Law, 466.
8 Am. Law Reg., 520.
Wood's Institute of the Laws of England, 9th Ed., Fol. 660.

c. It is sometimes said that a *statutory* pardon, such as the British Parliament might grant, need not be pleaded, but that the Court will take judicial notice of it; but this means only that in such cases the pardon being granted by a *public law*, the Courts take judicial notice of the law. But of course if anything *in pais* must be shown in order to bring a party within the terms of a pardon it must be pleaded and proved; and where there is an exception in the pardoning act, it must be shown by plea that the individual claiming the pardon is not within any exception.

(See cases last above cited.)

To say, in a case where the benefit

of this statute is sought as a defence against an indictment, that the party seeking to avail himself of the benefit may *demur* to the indictment and ask the Court to take judicial notice of the fact that he *said something* on a former occasion as a witness of which no record was kept, and which might not have even been committed to writing, would be an absurdity. It is probable that one of the reasons for obtaining in England the sanction of parliament to general pardons and amnesties was to dispense with the necessity of issuing numerous instruments by embodying the act of grace in a public law. But in such cases it was none the less necessary, if the pardon was limited to a special class, or depended upon conditions, that the party claiming the exemption should show by plea that he was within the class, or had complied with the conditions.

Chit. Crim. Law, *ubi supra.*

d. Again, the statute leaves him subjected to the *infamy* and *disgrace* of self incrimination, from which the constitutional safeguard absolutely exempts him.

It may be said that the *object* of the constitutional safeguard was not to protect against infamy or disgrace ; but how do we know that ? We do know that such is its necessary effect whenever it can be invoked, and how can we tell, or be permitted to inquire, whether such was not its object ?

It may be said that the purpose of the safeguard was to put into constitutional form the rule of the common law which protected witnesses, and that this rule did not furnish a protection against infamy and reproach merely. That is a disputed matter. Authorities are not wanting to show that the common law rule afforded protection against infamy and disgrace *simpliciter ;* (Commonwealth *vs.* Gibbs, 3 Yeates 429 ; Lessee of Galbreath *vs.* Erchelberger, 3 *Ib.*, 515 ; and the learned notes in 2 Phil. on Evidence, Edward's Ed., 930, note 589 and 940, note 593) ; but we are not dealing with *a rule of law created by judicial decision* and the form of which may be re-stated and re-shaped in accordance with its supposed objects. What we are considering is a constitutional safeguard expressed in clear, unchangeable and unambiguous language. If it were framed in language doubtful or obscure, we might inquire whether this or that effect was intended by it ; but can we abridge its operation when there is *no doubt* arising upon the language?

But, if we were permitted to inquire *how far* it was intended to operate, the just conclusion should be that protection against infamy and disgrace was *one* of the *motives* which led to its adoption and one of the *ends* sought to be reached. It is true that the exposure to infamy and disgrace alone does not entitle a witness to the constitutional protection ; but it does not follow from this that preservation from such exposure was not *one* of the grounds upon which that protection was framed. It is entirely possible, and certainly not improbable, that the framers of the constitution reasoned that in bestowing upon witnesses in criminal cases the privilege of *silence* when in danger of self-incrimination, they would at the same time save them, *in all such cases*, from the shame and infamy of confessing disgraceful crimes and thus preserve some measure of self-respect.

It is not quite true to say that the purpose of the constitutional safeguard was simply to put the common law protection beyond the reach of peril, for that safeguard does not even purport to do this. It applies only to *criminal cases*, and leaves the protection in *civil cases* to stand as a legal rule subject to legislative change; but it is true that both the safeguard and the common law rule spring alike from that sentiment of *personal self-respect*, *liberty*, *independence and dignity* which has inhabited the breasts of English-speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In scarcely anything has that sentiment been more manifest than in the abhorence felt at the legal compulsion upon witnesses to make confessions which must cover the witness with lasting shame and leave him degraded both in his own eyes and those of others. What can be more abhorrent than to ask a woman whom society esteems, or a clergyman, whether he, or she, has had illicit sexual intercourse, or to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented and of which the world was ignorant?

This Court has declared that no attempted *substitute* for the constitutional safeguard is sufficient unless it is a *complete* substitute. Such is not the nature and effect of this statute. A witness called upon to testify to something which will incriminate him, claims the benefit of the safeguard ; he is told that the statute fully protects him against prosecution for his crime ; "but," says he : "It leaves me covered with infamy and unable to associate with my fellows ;" he is then told that *under the rule of common law* he would not have been protected against mere infamy, and that the constitutional provision does not assume to protect against infamy *alone*, and that it should not be supposed that its object was to protect against infamy even when associated with crime. But he answers : "I "am not claiming any common law privi-"lege, but this particular constitutional "safeguard. What its purpose was we "do not know, and it does not matter. "It saves me from infamy, and you fur-"nish me with no *equivalent*, unless by "such equivalent I am equally saved "from infamy."

We are not contending, let it be remembered, that the constitutional safeguard extends to all cases where infamy and disgrace may be the consequences of compelled testimony, or to cases even of crimes where the crime has been *absolutely wiped out*, so that the witness will not by his testimony bring himself within the category of guilt. In such cases the safeguard is not in terms applicable ; our argument is that where, as in the present case, the crime is *not* wiped out, and where there may *rightfully* still be an indictment and conviction, and where the question is the one which we are now considering, whether a statute of indemnity is a full equivalent for the *silence* which the safeguard permits, a statute is not a full equivalent under which a witness may be compelled to cover himself with the infamy of a crime, even though he may be armed with a protection against its merely penal consequences.

Fifth Point.—So far, the argument has proceeded upon the tacit assumption that the crime asserted to be wiped out, or prosecution for which is asserted to be forbidden by the statute is a crime of the witness of the same nature, and growing out of the same charge, as that constituting the subject of inquiry, and such an one *only;* and upon the further assumption that the only peril to which the witness could be exposed, and, therefore, the only one against which the constitutional safeguard protected him, was *that* crime, so that the wiping out of *that* crime, or other equivalent protection against it, would secure to the witness the full benefit of the constitutional safeguard. But neither of these assumptions are by any means justified, and an interpretation of the statute, so far as it can be interpreted, will clearly show that there are a possible multitude of crimes against which a witness needs protection, and against the penal consequences of which the constitutional safeguard affords absolute protection, but against which the statute affords no protection whatever, inasmuch as it not only does not wipe them out, but does not in any manner protect the witness against prosecution for them.

1. The appellant was required to state all the particulars within his knowledge relating to certain supposed shipments of coal by a railroad company for another corporation, and certain supposed rebates of freight money paid by the former to the latter. He might have received moneys for this purpose and not have paid them over, and thus have been guilty of embezzlement; he might have paid them by a forged check and thus have been guilty of forgery, or he might have been guilty of murder, or burglary, or arson, and a statement by him to the effect that he paid the rebates at a certain time and in a certain place would have proved him to have been present at that time and place, and would have formed a link in a chain of evidence tending to show him guilty of one of those crimes. All these would be crimes against the *State of Pennsylvania*, and any testimony given by him might be used to convict him in the Courts of that State, or to obtain clues which might lead to the discovery of other sufficient evidence of crime against that State unless this statute protected him against that peril. There can be no question that the constitutional safeguard of silence was an effectual protection, nor can there be any question that the statute was absolutely inoperative in the way of furnishing him any protection whatever.

The statute certainly could not be interpreted as intending to wipe out crimes against a State, or to prohibit prosecutions in State Courts; and if it could be so interpreted, it would be wholly inoperative in that particular for want of power in Congress.

2. We need not argue to show that the constitutional safeguard is not limited to protection against some crime immediately growing out of, or connected with, the charge or transaction concerning which the witness is compelled to testify. If his answer would disclose any *fact* the knowledge of which might tend in any manner to incriminate him, or to furnish clues against him, he is protected, no matter how remote his crime may be from the subject as to which he testifies. Were it otherwise the safeguard would be of comparatively little benefit. But it has never been pretended that it was otherwise. The protection of the common law rule is never limited to a crime growing out of the matter under investigation, but permits the witness to be silent whenever his answer would subject him to criminal peril of any kind whatsoever.

3. It seems scarcely worth while to anticipate a possible suggestion that one nation does not in any manner take notice of crimes against another nation, and that the States of the United States, are, in respect to the general Government, foreign States. The

first statement is, *probably*, not tru (United States *vs.* McRae, 3 Law Rep. Cl App., 79) ; the last certainly cannot be. Th just and efficient execution of the crimina law of the several States is as importan to the United States as it is to themselves. The sum of the sovereign powers of the State and National Governments is only what a people must have and exercise in order to secure the general order and prosperity; and to think that the people ever conferred upon Congress the power to cripple the execution of their own State laws as to matters of exclusively State concern, or that Congress intended in this case to exercise any such power, were it given, would be wild imaginations.

Sixth Point.—But the difficulties, similar to those last mentioned in the way of holding this statute to be an equivalent for the constitutional safeguard have been only touched upon. There are an indefinite number of possible ways of self-incrimination, and in respect of crimes against the United States as well as the several States, against which that safeguard is a perfect security, but against which the statute in question affords no security whatever. While the constitutional safeguard extends its security to the case of every crime, of whatever nature, which any witness called upon to testify in a criminal case may have committed, the statute saves him from prosecution (if it saves him at all), only in respect to a *certain* *limited and defined class* of those crimes. As to the others (and there may be many) it has no operation, and leaves the witness utterly destitute of protection.

1. We are now called upon, for the first time in this argument to scrutinize the *language* of this statute and ascertain what its scope and extent are. We have already dealt with its failure to *abrogate* and *wipe out* even those crimes which it purports to deal with, contenting itself with forbidding the *prosecution* of violations of them by the witness, but still leaving him *liable* to such prosecution, and to rightful conviction unless he succeeds in discharging the burden, generally difficult and sometimes impossible, of pleading and proving a defense by way of *confession* and *avoidance.* We now, for the purpose of the argument, put that aside and treat the statute as absolutely wiping out from existence all the crimes which it affects to touch and all memory of them.

The question is what it wipes out. The language of the statute is "no person shall " be prosecuted or subjected to any penalty " or forfeiture for or on account of any trans- " action, matter or thing *concerning which he* " *may testify*, or produce evidence, docu- " mentary or otherwise." It will be at once perceived that the witness is protected from prosecution, not on account of *any fact he may disclose*, but only on account of the transaction, matter or thing *concerning which* he discloses it. These things are very different. If, for instance, the petitioner upon his examination before the Grand Jury had testified that as an officer of the railroad company he had paid certain moneys by way of rebate and had been asked "When, where, and to what particular person did you pay them?" his answer would show that he was in a particular spot and in the company of a particular person on a certain day, and if he had on that day committed at that place some crime, such as murder, arson, or burglary, his answer might form a link in a chain of evidence convicting him of the crime. (Fisher *vs.* Ronalds, 12 C. B., 762.) To compel him to answer the question would be compelling him to be a witness against himself, and there can be no doubt that, aside from the statute, the constitutional safeguard would protect him in a refusal to answer. It is equally certain that, if he were compelled to answer, the statute would afford him no protection against prosecution for his crime. The matter concerning which he testified was *the payment of rebates;* and if in that matter he had been guilty of an offense he would be secured against prosecution. But no one can pretend that he testified concerning a *murder*, or an *arson*, or a *burglary*, and, therefore, the statute would not and does not purport to protect him.

The constitutional safeguard extends its protection to all crimes which the witness *may* have committed. The statute reaches only a *part* of them, namely, those only which arise out of a "transaction, matter or thing" *concerning* which the witness may testify.

Let it be supposed that the witness had

been compelled to testify as above indicated, and had been afterwards indicted for a murder, and had pleaded to that indictment that he had been summoned as a witness before a grand jury to testify in respect to a charge pending before that body, and that he had been compelled to testify, and did testify before such Grand Jury concerning the *murder* whereof he stood indicted, could he support that plea by proving simply that he had testified before the Grand Jury, in answer to a question concerning the payment of certain rebates, that he paid them at a certain place, at a certain time, and to a certain person?

The difficulty, now under notice, with this statute is that it is framed on the assumption that the only peril to which the witness can be exposed, and, consequently, the only peril for which protection is necessary to be given in order to compel him to testify, is the peril of incrimination on account of the transactions, matters or things which may become *subjects of investigation* in any proceeding under the Interstate Commerce act, whereas the witness may be really exposed to many perils arising, not out of those subjects at all, but out of *what he may say in answer* to questions concerning them. It is the *things said*, and not the things *concerning which* they are said, which may involve him in peril.

2. It may be argued that this proves only that the statute may not afford complete protection *in every case*, but that this should not prevent the witness from being compelled to

testify in those instances in which it would protect him; and that in the present case we must suppose that the peril apprehended by the petitioner was of incriminating himself on account of the paying of rebates by the railroad company, which was the "transaction, matter or thing" *concerning* which he was called on to testify, and that the statute fully protected him from this peril. The statute cannot be thus defended.

a. We do not know what the source of the petitioner's apprehension was. *Non constat* that it was not on account of something he would be compelled to say in answer to the interrogatories addressed to him, which had no apparent relation to, or concern with, the payment of rebates.

b. And his peril also might arise, not out of anything he might *say*, but out of something which might be *inferred* from what he said; for instance, he might have to say that he made up an account of rebates *in his own handwriting.* He might thus furnish evidence of handwriting which might lead to his conviction for a forgery.

And it would be enough if his evidence contained statements which, though they did not concern the matters under investigation, and did not have anything in them which could be given in evidence to convict him of any crime, might yet *furnish clues* from which evidence might be gained against him

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matters, but it is as broad as the mischief against which it seeks to guard."

Counselman *vs.* Hitchcock, 142 U. S., 547, 562, 564.

c. But the statute is not a thing which can be applied in some instances, and held inoperative in others. It declares that no witness shall *in any instance* be allowed the constitutional protection of silence. It does not allow any inquiry concerning the extent of the protection which it affords. It *assumes* that it furnishes full protection in every case which *can by possibility arise*, and therefore, allows silence in no case. It is binding and obligatory in every case, or not at all. If a Court should refuse in any case to compel a witness to testify, it would not be for the reason that the statute was not intended to operate in such a case, but for the reason that it was unconstitutional and void.

Any attempt to employ this statute as a means of compelling testimony in certain cases only would be giving to the words used by Congress "a narrower meaning than they are manifestly intended to bear." This Court has determined that this cannot be done.

United States *vs.* Reese, 92 U. S., 214.
The Trade Mark Cases, 100 U. S., 82.
Baldwin *vs.* Franks, 120 U. S., 678.

d. But there is a further conclusive answer to this view. It is universally agreed testify in those instances in which it would protect him ; and that in the present case we must suppose that the peril apprehended by the petitioner was of incriminating himself on account of the paying of rebates by the railroad company, which was the "transaction, matter or thing" *concerning* which he was called on to testify, and that the statute fully protected him from this peril. The statute cannot be thus defended.

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This consideration is decisive upon the point of the validity of the statute, for the witness would be *in every case* compelled to testify, so far as to show a possibility of peril to himself which would entitle him to the protection of the statute. All the authorities are clear upon these two points. (1) That if the witness is by an indemnifying act subjected to any *burden* which the safeguard did not impose, the act is unconstitutional. (2) That the witness cannot be questioned (except upon the point of good faith) concerning the way in which he fears he may criminate himself. This would at once destroy the very privilege which is assumed to be conferred.

1 Burr's Trial, 244.

People *vs.* Mather, 4 Wend., 230, 252.

e. On the view now under notice the witness is told that he cannot have the benefit of his constitutional safeguard *unless he consent to so far reveal his crime* that the Court can see that the statute fails to protect him. No such condition can be imposed upon the constitutional immunity.

3. Nor should the argument be listened to that if witnesses are permitted to assert their broad privilege the proof of offences like those created by the Interstate Commerce Act will be made difficult.

Most abuses and perversions of sound principles creep into the law by yielding to what is supposed to be necessary for the public good.

The Court of Star Chamber itself was not created for the arbitrary purposes of a sovereign, but to remedy and punish neglects and crimes which the ordinary courts of common law, by reason of the corruption of juries and the dominating influence of great offenders, failed to reach. But the instrumentality thus created was afterwards found convenient for the purposes of tyranny. It was the bitter experience of the consequences of this perversion which led our ancestors to reassert in absolute form those rules which are necessary as a defence to individual liberty. This Court has on a former occasion that a witness claiming his constitutional privilege cannot be questioned concerning the way in which he fears he may incriminate himself, or, at least, only so far as may be needed to satisfy the Court that he is making his claim in good faith, and not as a pretext (Fisher *vs.* Ronalds, 12 C. B., 762 ; Adams *vs.* Lloyd, 3 H. & N., 351 ; Reg. *vs.* Boyes, 7 Jur. N. S., Part 1, 1158 ; 22 Am. Law Rev., 21, Note, p. 28 ; 2 Crim. Law Mag., 645, Note, 654). Any attempt at an enforcement of this statute in any particular case would necessarily involve the examination of the witness, not only for the purpose of satisfying the Court as to his good faith, but in order that it might be determined whether, good faith being conceded, the witness *had a good claim* to the privilege of silence, that is to say, whether the crime which he feared to disclose was one of those for which the statute furnished protection.

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"But illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. *A close and literal construction deprives them of half their efficacy*, and leads to gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of Courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

(Boyd *vs.* The United States, 116 U. S., 616, 635.)

Sixth Point.—This case raises no question concerning the interpretation of the constitutional safeguard against self incrimination. That the petitioner was entitled to its protection is fully admitted. But it is none the less important that its origin and full import and spirit should be fully understood. It was intended to secure for all time one of the principal fruits of a long prior struggle between the opposing forces of the spirit of *individual liberty* on the one hand, and the *collective power of the State* on the other; and, as such, should be construed as embracing the whole object contended for in the struggle.

1. What we understand by *liberty* is the exemption of the *individual* from restraint proceeding from the *State*. It matters not in what particular form this restraining power may be exercised, whether by an individual *despot*, by an *aristocracy*, or, under democratic forms, by a *majority*. The restraint in either case is equally destructive to liberty.

2. Even under unlimited monarchies, a large practical indulgence may be allowed by habit and tradition to individual liberty, and a high degree of civilization be, in consequence, attained ; but, in such cases, the precious possession is always in peril at the moment when most needed. The one distinguishing difference between the liberty and civilization of the race from which we are descended and others lies in the fact that the former has always demanded, and successively secured, *permanent safeguards* and *guarantees* for its freedom.

3. The original framers of the constitution failed to appreciate fully the jealousy for individual liberty so deeply implanted in the minds of the people of the colonies. The latter instinctively felt that they might be robbed of the possession which had been so dearly purchased by a *majority* clothed with the legislative power as easily as their ancestors had been by despotic authority ; and the first series of amendments to the Consti-

tution were demanded by the people in order that the most perfect safeguards might be secured.

4. The freedom of thought, of speech and of the press; the right to bear arms; exemption from military dictation; security of the person and of the home; the right to speedy and public trial by jury; protection against oppressive bail and cruel punishment, are, together with exemption from self-crimination, the essential and inseparable features of English liberty. Each one of these features had been involved in the struggle above referred to in England within the century and a half immediately preceding the adoption of the Constitution, and the contests were fresh in the memories and traditions of the people at that time.

Boyd *vs.* The United States, 116 U. S., 626.

5. A brief sketch of the history of this struggle will exhibit the following principal features:

a. The practice of compelling accused parties to criminate themselves by examinations under oath was never in accordance with the temper or spirit of purely English institutions, and was never permitted in the ordinary Courts of common law. It was, however, an essential feature of both the civil and canonical systems of law to subject parties to any judicial proceeding to the obligation to give testimony upon oath, and no distinction in this respect was made between civil and criminal cases.

b. The general hostility which Englishmen exhibited towards the encroachments of the civil and canon laws naturally inflamed the hostility towards the *practices* which were incidental to those systems ; and thus the opposition to these practices, and to the foreign jurisdictions themselves, became united and intensified each other.

c. But, in the course of time, the ecclesiastics, when they happened to find a sovereign favorable to their pretences, began to push their authority in the direction of discovering and punishing spiritual offences, especially that of heresy. Boniface and Cardinal Otho, who came over to England about the time when Henry III. married his French wife, A. D. 1236, the former being her uncle, and afterwards made Archbishop of Canterbury, were conspicuous in these undertakings ; and the latter promulgated a canon which authorized the administration of an oath commonly called the oath "*ex officio*." The language of the canon was: "Laymen shall be compelled by "excommunication, if need be, to take an "oath to speak the truth, when inquiry "shall be made by the prelates and Judges "ecclesiastical, for the correction of sins "and excesses" (3 Burns Ec. Law., 14).

d. These growing pretences challenged opposition; and it now became specially directed, not so much against the ecclesiastical jurisdictions, as against the particular practice of compelling a party to criminate himself.

An early statute of uncertain date "*Prohibitio formata de statuto articulorum cleri,*" probably in the time of Edward II., restricted the administration of self-incriminating oaths to testamentary and matrimonial causes, in which, it would seem, they had been allowed from a period long before. This statute may be said to be one of the original foundations upon which the rule protecting witnesses from self-accusation was erected.

e. The clergy, however, at length obtained from a pliant sovereign, Henry IV., in 1406, a statute under which they held themselves at liberty to again make use of the prohibited oath. And this relaxation was, in turn, done away with by a statute of the 25 of Hen. VIII. (1533).

f. The institution of the odious jurisdictions of the Star Chamber and the High Commission, both of them adopting arbitrary methods, self accusing oaths among others, seems to have brought about a renewal of the practice, notwithstanding the statute of 25 Hen. VIII.

The high hand with which these tribunals carried their proceedings, and especially the cruel extortion of admissions of guilt from the breasts of their victims, greatly excited the English people and added intensity to the opposition to self-incriminating methods of procedure.

The popular anger seems to have culminated in the case of the proceeding against John Lilburne, who was accused before the Star Chamber in 1637 of printing and publishing seditious books. He refused to take the oath *ex officio*, and was sent to prison. Four days later he was again brought up. and, still refusing, was fined and *whipped* through the streets to the pillory. He seems to have been somewhat of a *crank*—a class of persons who, from their persistency and courage, have in times past rendered the greatest service to British freedom at critical moments—and, when in the pillory, he reviled the bishops and scattered copies of his pamphlet, and was thereupon *gagged*. His reason for refusing the oath indicates the sentiment of the times. He declared that, "by law no free-born Englishman could be made to accuse himself," from which he was ever after called "Free-born John." He remained in prison until 1640. But he greatly contributed to bring the Court of Star Chamber to ruin. His Judges were impeached, and the record of the proceedings against him was expunged; and by the Act of 17 Car. I., cap. 10, the Court was absolutely abolished.

The Star Chamber, by Burn, pp. 19-149.

g. Just before the actual abolition of this odious tribunal, an end was sought to be put to its practice of compelling self-incrimination by the Stat. of 16 Car. I., c. 2 (1641), and this not proving entirely effectual, a further act (13 Car. II., c. 12, 1662) was passed, which left no pretence for its further continuance.

h. A learned article on the maxim of "*nemo tenetur seipsum prodere*," in the *Harvard Law Review* (Vol. 5, p. 45) has been resorted to in framing the above sketch. It may be usefully consulted, but most of its conclusions seem wholly unwarranted.

6. Attempts have been made to show that there was nothing more substantial in this struggle than the antipathy of English lawyers against the civil and canonical procedure, and to question the value of the rule which exempts the citizen from the obligation to give evidence tending to criminate himself. (See Article above referred to, and Bentham's Rationale of Judicial Evidence, Bentham's Works, Edin., 1843, Vol. VII., p. 458, *et seq.*). But to impute so long and earnest a struggle to the jealousy of a small professional class is shallow and superficial. It is more reasonable to explain the British antipathy to the civil and canonical systems of procedure by referring to the fact that these systems had been framed under despotic governments and were deeply imbued with the spirit and methods of absolute power. The legal pro-

fession but voiced the deep public prejudice against them. Nor is it easy to believe that the people of the American colonies would have insisted upon the incorporation into their fundamental law of the mere prejudice of a small professional body of men.

7. It is not a very becoming office in an American Court to *weigh the value* of a maxim which has been crystallized in the constitution; but this particular rule would find an easy vindication in the precepts of the philosophy of liberty.

   a. The proud sense of personal independence which is the basis of the most valued qualities of a free citizen is sustained and cultivated by the consciousness that there are limits which even the State cannot pass in tearing open the secrets of his bosom. The limit which the law carefully assigns to the power to make searches and seizures proceeds from the same source.

   b. Free society contemplates that there are other public and social objects which should not be sacrificed in the effort to procure the punishment, in every instance, of crime. The probibition itself which we are considering, and the familiar adage, that it is better that ten guilty men should go unpunished than one innocent man should suffer, are proofs that, in the view of our law, too high a price may be paid for the uniform enforcement of the criminal law.

c. The essential cruelty of compelling a man to betray his own guilt needs no illustration. If the public interest *absolutely demands* that the disclosure should be made (and such must be the argument of those who assert the rightfulness of compulsion in such cases), it should be enforced by whatever means will accomplish the object. Imprisonment is only a less cruel resort than *torture.* The very circumstance that a lofty spirit will accept imprisonment, and even torture, in preference to revealing some secrets of the breast is a sufficient proof of the extremity of the cruelty which enforced disclosure involves.

d. The *untrustworthiness*, in general, of such testimony is also a main consideration. Truth can be thus extorted only from the finest spirits ; and in their case the compulsion is real torture. In a great number of instances falsity is the ready product, and scarcely costs the victim a pang. What can better indicate the low estimate placed by the law upon such evidence, than the rule, vindicated by long experience, that confessions made under the promise, or even the expectation of favor, if they have been encouraged by a holding out, are to be condemned as involuntary, and rejected when offered as evidence ?

1 Phil. on Evi. (Edwards' Ed., 544).

e. Nay, such compulsory evidence is often worse than nothing. The victim will sometimes accuse the innocent rather than betray himself.

f. And what can be better calculated to break down the sanctify of an oath than the frequent exhibition of perjury, sure to occur, and as sure to be justified, or excused, in men's minds, when perjury is made necessary to safety? Even now a man is sometimes compelled to testify as to whether he has had illicit intercourse with some woman of virtuous repute. Which would be the greater disgrace in the eye of the world, perjury, or the betrayal of the woman? Is it worth while, for the sake of the possibility, so slender and doubtful, of gaining a benefit, to incur mischief so grave and sure? The common law rule and the constitutional prohibition are the fruits of a negative answer to this question.

8. In short, the constitutional prohibition is based upon *a permanent quality of human nature*; and upon a universal antipathy to enforced self accusation springing out of that quality. It proceeds, upon a recognition of the fact, that the consequence of refusing to testify where the law requires it involves, not indeed direct torture upon the rack, but the next thing to it, *perpetual imprisonment;* that *proud* men will endure even this punishment rather than cover themselves with shame; that *timid* men will run the hazard of it rather than confess themselves guilty of crimes which will involve a worse punishment, and disgrace coupled with it; and that *bad* men will commit perjury in order to escape it.

The rule is based upon the sound philosophy which declares that it is better that the *c*. The essential cruelty of compelling a man to betray his own guilt needs no illustration. If the public interest *absolutely demands* that the disclosure should be made (and such must be the argument of those who assert the rightfulness of compulsion in such cases), it should be enforced by whatever means will accomplish the object. Imprisonment is only a less cruel resort than *torture*. The very circumstance that a lofty spirit will accept imprisonment, and even torture, in preference to revealing some secrets of the breast is a sufficient proof of the extremity of the cruelty which enforced disclosure involves.

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The rule is based upon the sound philosophy which declares that it is better that the

State should content itself with such means for the conviction of crime as it possesses outside of a resort to such a practice, even if, in some few cases, crime must be allowed to go unpunished.

9. The authorities fully sanction the foregoing view of the foundation of the maxim incorporated into the constitutional provision.

Starkie, in his work on evidence, says (10th Am. Ed., pp. 40, 41), that the rule is based upon two grounds, one of policy and one of humanity: "of policy, because it would "place a witness under a strong temptation "to commit perjury; and of humanity, be- "cause it would be to extort a confession by "duress, every species and degree of which "the law abhors."

Mr. Justice Bradley, in U. S. *vs.* Collins, 1 Woods, 511, says that the immunity is founded upon principles of public policy, and a just regard to the liberties of every citizen.

Chancellor Walworth, in Perrine *vs* Stephens (7 Paige, 598, 601), says, referring to a statute compelling the disclosure of a taking of usury, and which, at the same time, forbade the disclosure from being used against the person making it, said: "I may be per- "mitted to doubt whether it is strictly con- "sistent with the spirit of our institutions "and of an enlightened legislation to tempt "the conscience of any man so far as to com- "pel him to make a disclosure of an usurious "bargain by his answer on oath." He referred to no other reason than the loss of both principal and interest thereby entailed.

And Mr. Justice Bronson, speaking of the same statute, says: "The morality of this "statute is very questionable and it ought "not to be extended by construction" (Bank of Salina *vs.* Henry, 1 Hill, 555, 557).

And Lord Coke says, referring to the oath *ex officio:* "And for this cause, in these "cases, and such like, the ecclesiastical "Judge ought not to examine *partem ream* "upon that oath, for, as a civilian has said, "that is *inventio diaboli ad destruendas* "*miserorum animas ad infernum*" (12 Co. Rep.).

10. And the rule that the constitutional guaranty should be broadly and liberally interpreted in order to secure its *whole object* will not be questioned.

a. In Boyd *vs.* The U. S., *ubi supra*, this Court did not hesitate to regard a revenue suit to enforce a forfeiture as a "criminal case," and as being against the claimant, although the proceeding was *in rem.*

11. The history of the framing and adoption of the prohibition also sustains the same interpretation if indeed it does not preclude any different one. The form of the prohibition as originally recommended to the first Congress by a committee was, "No person shall "be compelled to be a witness against him-"self." In this form it completely embraced

the whole common law rule; but it went further; further even than the committee could have intended; for it precluded the compelling of answers to bills of discovery in civil cases. It was manifestly for the purpose only of correcting this error, and in order to leave civil cases subject to the ordinary rule of law that a member moved to qualify by inserting the words "in any criminal case" which was agreed to without discussion.

Annals of Congress, Vol. 1, p, 753.

Seventh Point—But finally, whatever view be taken of the precise effect of the act based upon its particular language, whether that it extinguishes and wipes out the crime, or leaves guilt continuing, and merely forbids prosecution, it is an attempt to exercise the power of *pardon*, a power not delegated to Congress, but confided solely to the Executive, and the act is invalid for this reason.

1. The substance and effect of the act is to exempt guilty persons from the penal consequences of their crimes, and in whatever form this may be attempted it is *pardon*. This follows from the definition of pardon, everywhere approved, given by Mr. Chief Justice MARSHALL:

> "A pardon is an act of grace, proceed
> "ing from the power entrusted with the

"execution of the laws, which exempts "the individual on whom it is bestowed "from the punishment the law inflicts for "a crime he has committed."

Nothing could more precisely define the power attempted to be exercised by this Act.

2. It would be to no purpose to say that the statute is one relating to the *giving of testimony* in certain judicial proceedings, and that the exemption from criminal punishment which it affords is but an *incident* of that legislation, and designed merely as an instrumentality for the compelling of testimony. It it be an incident only, still Congress has no more authority to employ that power by way of *incident* than it has to exercise it in any other way.

That Congress has not this power is shown in two ways: (1.) It is not delegated in the Constitution. (2.) It is expressly confided to the President.

If Congress had the power to exercise it as an *incident*, it might exercise it in any case it pleased, simply by making such exercise *incidental* to some other legislation.

3. It may be argued that the power thus attempted to be exercised by this statute is that of *general* pardon, and that such power was habitually exercised by the British Parliament, and that it is hence to be inferred that the power bestowed upon the President was the power of granting *special* pardons to

particular individuals, leaving the power of *amnesty* and of *general pardons* to be still exercised by Congress, at least where it might be used as an appropriate means to accomplish particular objects within an admitted authority. There is no foundation for such reasoning.

a. The statute can hardly be said to be one bestowing a *general* pardon. It does not purport to extinguish, or to affect, any crime as such. It is not a pardon of all offenders; nor is it a pardon of a particular class of offenders. It may indeed be said to embrace a *class*; but the class is determined by certain conditions. It is in reality a *conditional* pardon, and the conditions are *precedent.* If a man is called as a witness in a proceeding under the Interstate Commerce Act, and gives testimony of a certain character, he falls within the *conditions* and is entitled to the exemption. But, aside from this, it matters nothing whether the pardon be general or special, conditional or otherwise, it must, in either case, proceed from the President alone.

b. It was so in England. It is proper, as Chief Justice Marshall observes in the case above referred to, that, in order to determine the purposes of the framers of the Constitution, we should look to the sources from which the law they were acquainted with was derived; and these sources inform us that the pardoning power was always, in English law, regarded as the prerogative of the King alone. It is, indeed, true that an act of Parliament exercising the power in question would be valid and effective, because no act of Parliament, however *unprecedented*, can be *unconstitutional.* It is also true that acts for general pardon and amnesty have been, in many instances, enacted by Parliament.

The authority of Parliament was necessary whenever it was designed to do away with the consequences of attainder or corruption of blood. The King's pardon would not accomplish this. But so far as mere exemption from punishment for crime is concerned, even when acts to that effect were passed by Parliament, they were, it is believed, in every case passed as *acts of grace* which were very different from ordinary acts of legislation. An *act of grace* was one supposed to proceed from the sovereign, could never be amended in the course of its passage, was read only once in either House, was voted upon by the members standing uncovered, and contained at the end a clause expressing the thanks of Parliament to the sovereign for it.

1 Bl. Com., p. 187.

c. The definition above referred to of Chief Justice Marshall is in precise accordance with the foregoing view. He says: "A pardon is an act of grace," thus employing the very term used to designate those acts of Parliament of the character above described. He further says, "proceeding "from the power entrusted with the execution of the laws," thus making the source from which, in England, invariably the act was supposed to proceed. And he further says, "which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed," thus describing the operation and effect of the pardon as simply exempting the individual from the punishment for crime.

d. The same view will be found fully supported in a learned article upon certain questions in the law of pardons, contained in 8th Am. Law Reg., N. S., 513. (See also Observations of Holt, L. C. J., Rookwood's Trial, *13 Howell's State Trials, 186*).

e. But if the definition of Marshall be correct, that the exempting of an individual from punishment for his crime is a *pardon*, there can be no doubt that the statute in question is an unauthorized attempt to exercise that power. This Court has fully determined that pardons and amnesties, whether general or special, are exclusively within the domain of the executive authority.

Ex parte Garland, 4 Wall, 380.
United States *vs.* Klein, 13 Wall, 128–141.

Lastly.—The order appealed from should be reversed, and an order made directing the discharge of the appellant from imprisonment, with costs.

JAMES C. CARTER,
Of Counsel for Appellant.

Office Supreme Court U. S.
FILED,
DEC 30 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 765.

THEODORE F. BROWN,
Appellant,
vs.
JOHN W. WALKER,
U. S. Marshal for the Western District of Pennsylvania.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE APPELLEE.

GEO. F. EDMUNDS,
Of Counsel for the Appellee.

ALLEN, LANE & SCOTT, PRINTERS, PHILADELPHIA.

Supreme Court of the United States.

THEODORE F. BROWN,
Appellant,
vs.
JOHN W. WALKER,
United States Marshal for the
Western District of Pennsylvania.

STATEMENT.

The Grand Jury of the District Court of the Western District of Pennsylvania, on the 7th of May, 1895, while the court was in session there, was "engaged in investi-"gating into certain alleged violations in the District "aforesaid of an Act of Congress, entitled 'An Act to "'Regulate Commerce,' approved February 4th, 1887, and "the various amendments and supplements thereto, by "E. P. Bates and Thomas R. Robinson, officers and agents "of the Allegheny Valley Railway Company." (Rec., pp. 3 and 4.)

Brown, the appellant, appeared for examination in response to a subpœna and was sworn. He was the auditor of the railway company, whose duty it was to audit the accounts of the various officers, and he was engaged in that duty at the time in question. (Rec., p. 4.) Having stated these facts, he was asked this question:—

" Do you know whether or not the Allegheny Valley

"Railway Company transported for the Union Coal Com-"pany through the months of July, August, and Septem-"ber, 1894, coal from any points on the low grade divisions "of said railroad company to Buffalo at a less rate than "the established rates in force between the terminal points "at the time of such transportation?"

He answered thus:—

"That question, with all respect to the Grand Jury and "yourself, I must decline to answer, for the reason that "my answer would tend to accuse and criminate myself."

He was then asked this question:—

"Do you know whether or not the Allegheny Valley "Railroad Company during the year 1894 paid to the "Union Coal Company any rebate, refund, or commission "on coal transported by said railroad company from "points on its low-grade division to Buffalo; whether it, "the Union Coal Company, obtained a transportation of "such coal between the said terminal points at a less rate "than the open tariff rate, or the rate established by said "company? If you have such knowledge, state the amount "of said rebates, or drawbacks, or commissions paid, to "whom paid, the date of the same, and on what terms, "and state fully all the particulars within your knowledge "relating to such transportation or transportations."

To this question the witness responded thus:—

"That question I must also decline to answer for the "reason already given."

(Rec., p. 4.)

Thereupon the Grand Jury reported these facts to the court, and Brown was regularly called upon to show cause why he should not answer such questions or stand in contempt. (Rec., p. 5.) The matter was heard by the court, and Brown was directed to appear before the Grand Jury and answer those questions. (Rec., p. 5.) Brown did appear before the Grand Jury pursuant to the order, and again refused, for the same reasons, to answer those questions. (Rec., pp. 5 and 6.) This fact was again reported to the court by the Grand Jury, whereupon Brown was adjudged to be in contempt, and ordered to pay a fine, &c. (Rec., p. 6.) Brown thereupon petitioned for a *habeas corpus* in the Circuit Court of the same district, stating in his petition the substance of the facts already recited. (Rec., p. 2.) The writ was issued as of course, and Brown was brought up by the Marshal, and hearing was had, and on the 11th of September, 1895, the Circuit Court discharged the writ of *habeas corpus*, and remanded Brown to the custody of the Marshal. (Rec., p. 14.) From that judgment Brown appealed to this court.

The Act of Congress under which the witness was adjudged to be bound to answer was passed on the eleventh day of February, 1893 (Stats. at Large, vol. XXVII., p. 443); and it provided that in cases arising under the Interstate Commerce Acts, whether before the Commissioners, "or in any case or proceeding, criminal or otherwise," the witness should not be excused from answering on the ground that his answer might tend to criminate himself; and it then provided: "But no person shall be prosecuted, "or subject to any penalty or forfeiture, for or on account "of any transaction, matter, or thing concerning which he "may testify or produce evidence, documentary or other- "wise, before said Commission, or in obedience to its sub- "pœna, or the subpœna of either of them, or in any such "cause or proceeding."

POINTS.

1. The Act of 1893 is constitutional:—

(*a*.) The provision in the Constitution, that the President shall have power to "grant reprieves and pardons," was evidently intended and phrased so as to confer upon him those powers, and those only, that the English Crown possessed at the time of the Revolution; leaving to Congress the same political power in respect of the subject that the English Parliament possessed. The very phraseology employed clearly implies that this power was applicable only to the case of particular individuals who should be *named* in the reprieves and pardons. There can be no such thing as a *reprieve* of a *person*, or a class of persons, before conviction, and therefore the use of the word "pardon" in the same connection necessarily implied a description of individual cases, and did not include, as an *exclusive* executive power, the exercise of the *political* power of granting that sort of pardon that always had been embraced in the terms "amnesty" or "acts of oblivion" or "general pardons." The English Parliament had always exercised the power to pass such Acts. "A pardon by Act of "Parliament is more beneficial than by the King's char- "ter; for a man is not bound to plead it, but the court "must *ex officio* take notice of it." (Tomlin's Jacob's Law Dic., tit. "Pardons," III.) In the same dictionary, under title "Amnesty," that word is defined to be "An act of "pardon or oblivion, such as was granted at the Restora- "tion of King Charles II. The amnesty referred to was by an Act of Parliament, A. D. 1660, in the usual form, "with the advice and consent of the Lords and Commons "in this present Parliament assembled." (Statute 12th Charles II., chap. XI.) There are no less than twenty-nine Parliamentary Acts of general pardon stated in the index to Ruffhead's Statutes at Large, printed in 1764.

In Bishop's New Criminal Law (8th ed.), vol. I., sec. 900, it is stated that "according, therefore, to the system "of laws whence ours are derived, pardons may proceed "from either the Executive or Legislative Department, the "authority of neither being exclusive." This proposition as applied to offenses *already committed* has been denied in some of the State courts, but never as applied to a case like the present, where a supposed wrong act, referred to in the statute, took place after the passage of the Act.

It is surely safe to say that no authority can be found supporting the idea that the President of the United States could have lawfully made a proclamation of pardon or amnesty or oblivion in the language or of the substance and effect of the provisions of the Act of 1893.

In the State *vs.* Applewhite, 75 N. C. Rep., p. 229 (1876), it was held that the legislature of that State had the power to grant amnesty.

In the "Criminal Law Magazine" for July, 1885, vol. VI., No. 4, will be found an instructive article on the whole subject of pardon and amnesty, with copious references to cases.

(*b.*) The Act of 1893 provided for a class of pardons or amnesties or oblivions, by whatsoever name they may be called, that no king was ever allowed to grant, in that it provided *in advance of the commission of* the particular class of crimes named in the Act, that in a certain event—*i. e.*, testifying to the truth—a person who should so testify should be deemed to have been *innocent ab initio.* This case is precisely of that character. The transactions that Brown refused to speak of took place in the year 1894 and 1895, after the Act was passed.

But although it is not necessary to this case, it is maintained that Congress has power to pass Acts of general pardon, amnesty, or oblivion for past offenses, as had been done by Parliament for more than two hundred years before, and down to the time of our revolution.

In Garland's Case, 4 Wall., 386, this court held, in accordance with all the books, that acts of oblivion and amnesty or pardon put the offender in such an attitude that "in the eye of the law the offender is as innocent "as if he had never committed the offense."

United States *vs.* Paddelford, 9 Wall., 531. A general pardon by President Lincoln under circumstances and conditions named, and under the Act of July 1st, 1862, section 13, was held to be good. No question of the power of Congress to pass the Act was suggested in the opinion of the court, but the Chief Justice, in referring to the proclamation of the President, did say that the proclamation, "if it needed legislative sanction, was fully "warranted by the Act." The thirteenth section of the Act provided: "That the President is authorized at any "time hereafter, by proclamation, to extend to persons "who *may have* participated in the existing rebellion in "any State or part thereof, pardon and amnesty, with such "exceptions and at such time and on such conditions as "he may deem expedient for the public welfare." (Stat., vol. XII., p. 592.) The proclamation of President Lincoln, referred to, was dated December 8th, 1863; it recited the executive power on the subject of pardons and recited the existence of the rebellion, and recited that "many persons have committed and are now guilty of treason "against the United States," and it referred to the Act of Congress, above quoted, and stated that "the *Congressional* "*declaration* for limited and conditional pardon *agrees* with "well-established judicial expositions of the pardoning "power." It then proceeded to grant pardon to persons, by classes, who had been (not who should be) guilty of rebellion against the United States, &c., upon conditions named. A proclamation of general pardon was issued by President Johnson on the 29th of May, 1865, in which he refers to the proclamation of President Lincoln of the 8th of December, 1863, and recites that some have failed to get the benefit of that proclamation, &c., and proceeds to grant pardon to certain classes of persons.

Story's Commentaries on the Constitution, on the subject of pardons, are devoted entirely to offenses that had been committed, and not at all to any provision made *before any offense is committed,* that, under certain circumstances, the act of the individual shall be deemed not to have been an offense. Such a power as this, providing beforehand for acts that otherwise would be criminal, being put in a state of oblivion if they shall be followed by certain events, was never, in any civilized Government, conferred upon the Executive. The distinction between the two classes of cases is too obvious to be much enlarged upon.

In the first instance, the pardon, whether general or special, is applied to offenses that have already been committed, and are supposed to be generally known, in respect of their character and degree. In the second instance the whole sovereign power, from reasons of policy looking to the future as well as to the past, provides, that certain acts which would otherwise be criminal shall, if followed by certain facts, be, "in the eye of the law," deemed innocent, and treated as if they had never been committed.

II. If it can be imagined that Congress had not the power, as an act of political legislative function, to pass the law in question, yet *the law was approved by, and had the sign manual of the President*, and, therefore, if he had this power vested in himself exclusively, *he* exerted it, and has, by the Act signed by himself, made the proclamation of pardon, &c., to all those who should comply with its conditions. If the two Houses of Congress had no power to say it, the President had the power to say it, and he did say it.

III. The contention that the Act of 1893 is unconstitutional rests upon the suggestion that would have been fundamental and conclusive in nearly all the cases that have arisen under State and Congressional laws that only extended, as in the Counselman case, to forbidding the use of the evidence given, and did not embrace an effacement of the criminal character of the act itself. If the legislative body had no power to say when, *under any cir-*

cumstances, a witness claiming the incriminating privilege should be compelled to answer, this would have been urged by counsel as the very cardinal and conclusive objection. But no such idea had found a place in the minds of most eminent and learned counsel. This is shown in the very learned and comprehensive brief of Mr. Carter in the Counselman case. He there states the true and final distinction in the unquestioned exertion of the political power. He says: "It is respectfully submitted that no "statute which *leaves the crime existing* can have such an "effect." Section 830, Revised Statutes, was, as he contended, and as this court held, inadequate, *because it did leave the crime existing.* The opinion of this court was placed precisely on this ground and no other: 142 U. S., 547. Mr. Carter states the essence of the distinction thus: "There is, indeed, one situation in which the constitu- "tional prohibition affords no privilege to party or wit- "ness to refuse to testify, notwithstanding that the tes- "timony sought to be elicited, when judged by *character*, "might seem to be self-incriminating. This is when, "although the testimony would at one time have a "tendency to convict its author of a crime, has *ceased* to "have that character. We do not draw in question the "propriety of those decisions which hold that the party or "witness is not privileged when he has received a *pardon*, "even if it is delivered while he is on the witness stand; "and the case where a prosecution has become barred by the "Statute of Limitations, although somewhat different, may "possibly be brought within the same reason. In these "cases the *quality of criminality* has been *taken away* from "the acts concerning which the witness is called upon to "testify, as much as if the law making them criminal had "been repealed; and neither the constitutional prohibition "nor the common-law privilege has any longer any application to them." There is nowhere in his complete and admirable discussion any hint of a doubt of the legislative political power to deal with the subject adequately; nor is there, it is believed, any suggestion of any writer to that effect, for in the aspect of the matter now under discussion, the legislative power is exerted in determining the *nature and quality of the conduct* of the witness in respect of the transaction. In one state of circumstances the legislative power has declared that it shall not be deemed criminal, and that the person surrounded by that state of circumstances shall be deemed to have always been innocent, and not to have committed any offense at all. So far, it is believed that no suggestion can be found in any of the books of the law adverse to this view. It is true that there are two or three cases in the State courts which hold, under the language of their Constitutions, that the power of pardon of a definite and *past* offense rests in the Executive only. But this is quite another thing.

IV. The suggestion made below that the witness would be put to the necessity of proving that he had given evidence, &c., furnishes no objection to the validity or scope of the Act of Congress. He having testified, has thereby established his innocence; and being an innocent man, he stands equally secure with all other innocent men who may be, and often are, accused of offenses with which they never individually had any connection whatever; and like them he has to show a defense if the proof of the prosecution goes far enough to call upon him for any defense at all. Now in this respect he is on a precise equality with every other innocent person who may be accused of crime.

V. But whether or not Congress and the President together can grant pardons, &c., the present case really involves no constitutional question of that sort. That Congress has power to define what acts—not intrinsically wicked at least—shall be offenses against, and be punishable by law, is undoubted by every one except the anarchist. The law has, in the class of cases of which this is one, provided that a designated course of conduct shall or shall not be a crime depending wholly upon the circumstances which follow the particular act. The moment the doer of the act otherwise unlawful opens his mouth to speak, the act of which he speaks becomes, as to him, a perfectly innocent one—one in respect of which he cannot possibly criminate himself. He has therefore nothing to claim the benefit of the Constitution upon. He is not asked to criminate himself, but he is asked to show himself a pure man and a public benefactor.

VI. The exposure to shame and reproach is not and was not intended to be governed by the constitutional protection. This is too clear to warrant an array of authorities. Some leading cases are referred to in the opinion of the court below in this case. (Rec., pp. 11 and 12. See also Wharton's Criminal Evidence (9th Ed.), sec. 471; 1st Greenleaf's Evidence, sec. 454.)

And indeed it is obvious that, so far as shame and reproach go, these are confessed and deserved in the very claim by the witness of his privilege.

VII. The safety and welfare of *all* the members of the State demands *some* protection as well as that of its individual members in respect of injury to their supposed sensibilities touching conduct destructive of the general safety and equal rights of all. To give immunity against telling the truth, to a law breaker and rogue—as confessed in his claim of privilege—because his neighbors would think ill of him, would be absurd.

VIII. As the Constitution does not furnish protection to the reputations of this class of people, Congress has authority to require them to do this kind of public service, even at the risk of unpopularity.

IX. The common-law rule (which the legislative power has a perfect right to change) has long been well settled, that if the answers required are relevant to the case, the witness must answer, even at the risk of injury to his moral sensibilities and his reputation.

GEO. F. EDMUNDS,
Of Counsel for the Appellee.

SUPPLEMENT.

Since the foregoing was prepared I have received the brief for the appellant. I only deem it desirable to add to what I have already said the following:—

As to Fourth Point (*d*).

1. The constitutional provision does not save the witness from "infamy." It saves him from exposing himself to punishment for a crime on proof furnished by himself. In every moral sense his invoking the screen of the Constitution puts him in the infamous category as much as (and sometimes even more than) if he had told his story.

2. In the case supposed, there never "may *rightfully* still "be an indictment and conviction." The crime, if it existed in this case, *is* "wiped out." The statute forbids, in explicit terms, not only conviction but *prosecution.*

As to Fifth Point (1).

1. This point is devoted to supporting the suggestion, for the first time, it is believed, made in any court, that the evidence, if given, might show that the witness had in the act he disclosed been guilty of an offense against *another sovereign* whose power the first sovereign could not impair. The last part of the proposition is admitted. When sovereigns are independent neither can either create, define,

punish, or pardon offenses against the other. But this does not help the appellant's case for the following reasons :—

(*a.*) The constitutional protection is solely a protection against criminal prosecutions *of the government that grants it.* Both the words and the philosophy of the Constitution exclude every other suggestion.

(*b.*) In this case the question asked the witness related *exclusively* to matters of interstate commerce, in respect of which, as described in the questions themselves, there can be but one sovereign ; and his refusal to answer related to his alleged fear of punishment by *that* sovereign (the United States) and to nothing else.

(*c.*) The laws of the States of the Union have no more *legal* relation to the laws of Congress in respect of crimes than either have to the laws of Great Britain (21 How., 506, Ableman *vs.* Booth).

(*d.*) If the questions were relevant to the subject (which is undisputed), no answer the witness could make could possibly tend to criminate him under the laws of any other government, be it foreign or State.

(*e.*) If the witness had refused to tell his name on this ground, could it be seriously argued in this court that he was justified in refusing on the ground that possibly this might furnish a clue to his identification as a law breaker in the British Empire?

(*f.*) But his privilege was claimed in respect of telling of transactions that no law save that of the United States could or did touch, and as to *everything* he should say that law made him innocent.

As to the Sixth Point (1).

1. The argument on this point deals in a refinement equal to that which so much interested and troubled the Schoolmen in the case of a man leading an animal to market with a rope—the dispute being whether it was the man or the rope that took the animal to market. If the witness disclose anything, he must testify of a "transaction," a "matter," or "thing." These, so far as the present knowledge of the world has advanced, *are each and all facts;* and the statute declares that he shall not be *either prosecuted or convicted* on account of those facts. It is conceded that the act of testifying or refusing to testify is also a fact; and that if any law made *the act of giving true evidence a crime,* it might possibly be contended by a casuist that the present statute does not save him.

GEO. F. EDMUNDS,
Of Counsel for the Appellee.